

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

ROBIN MAYFIELD, et al.)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION NO.: 3:17-CV-514-CWR-
)	FKB
)	
BUTLER SNOW LLP, et al.)	
)	
Defendants.)	

**PLAINTIFFS’ MOTION TO NOTICE DEPOSITION OF THAD COCHRAN, AND
MEMORANDUM IN SUPPORT OF SAME**

COME NOW Plaintiffs Robin Mayfield, Owen Mayfield, William Mayfield, and the Estate of Mark Stevens Mayfield (collectively, the “Plaintiffs” or “Mayfields”) and, pursuant to Section 6.F.5 of the Case Management Order [Dkt. 67] in this matter, respectfully file this Motion to Notice Deposition of Thad Cochran (the “Motion”), and Memorandum in Support of Motion. In support thereof, Plaintiffs state as follows:

Procedural Posture

The Case Management Conference (the “CMC”) was conducted before Magistrate Judge F. Keith Ball on January 10, 2018 (*see* Minute Entry of January 26, 2018). On January 26, 2018, the Court entered the Case Management Order. [Dkt. 67]. The Case Management Order provides that discovery will be conducted in two phases, with Phase I limited to written discovery only. The Court instructed that “no depositions may be noticed or taken during Phase I, except by order of this Court after the filing of a motion requesting such deposition(s).” *Id.*, at 6.F.5. The case is currently in Phase I.

At the CMC, the issue of the preservation of the testimony of United States Senator Thad Cochran (“Thad Cochran” or “Senator Cochran”) was specifically discussed. Judge Ball instructed Plaintiffs to file the instant motion, and to send a proposed order for his signature.

Need for the Testimony Sought by Deposition

This case involves the 2014 campaign of State Senator Chris McDaniel in which he challenged U.S. Senator Thad Cochran in the Republican primary. *See generally* Amended Complaint, [Dkt. 6]. The Amended Complaint includes allegations about that campaign and actions taken by the Defendants that amounted to violations of Mark Mayfield (“Mark”)’s constitutional rights, abuse of process, negligent infliction of emotional distress, wrongful death, and civil conspiracy. Dkt. 6, ¶1. These violations and tortious acts by the Defendants occurred when Mark was wrongfully arrested and prosecuted for alleged involvement with an incident referred to in the Amended Complaint as the “Rose Cochran Incident.” Dkt. 6, ¶ 90.

The Rose Cochran Incident took place after conservative blogger and McDaniel supporter Clayton Kelly sought to help expose Senator Cochran in an affair with his staffer Kay Webber. Kelly ultimately entered the nursing home facility at St. Catherine’s Village, where Thad Cochran’s wife Rose was a resident, and took photographs of Mrs. Cochran and the nameplate of her room. *See* Dkt. 6 p. 13. Those photographs were posted online to Clayton Kelly’s YouTube channel in an anti-Cochran post constituting political speech and published by Kelly. *Id.*

The Mayfields’ Amended Complaint sets forth in detail allegations concerning Senator Cochran’s campaign, campaign financing and fundraising, campaign staffers, political allies, the law firm and attorneys who represent him and his campaign (Defendants Butler Snow LLP and Donald Clark, Jr.), and Defendant Mary Hawkins-Butler. Thad Cochran’s knowledge about this information is important discoverable information.

For instance, the Amended Complaint alleges, among other things, the following facts about Senator Cochran, his campaign, and individuals and organizations acting on his and his campaign's behalf. Thad Cochran has knowledge and information about these matters¹:

- That Defendant Don Clark, “representing Senator Thad Cochran, contacted the Madison Police Department on May 15, 2014, about a possible case of exploitation of a vulnerable adult.” [Dkt. 6], ¶ 90 (emphasis added).
- That Defendant Butler Snow LLP (“Butler Snow”) and Defendant Don Clark (“Clark”) represented Thad Cochran personally and also served as counsel for his federal election campaign (the “Thad Cochran Campaign”). *Id.*, ¶ 123.
- That the “Thad Cochran Campaign was an extension of Senator Cochran, and its “employees, vendors, and attorneys were authorized to act on his behalf.” *Id.*, ¶ 124.
- That the Thad Cochran Campaign “was run by individuals close to Butler Snow and Clark.” *Id.*, ¶ 125.
- That “Butler Snow and Clark provided funding and legal, governmental, and/or political advice to Mississippi Conservatives, a [Haley] Barbour-run Super PAC supporting Thad Cochran.” *Id.*, ¶ 126.
- That Mississippi Conservatives raised and spent \$3.32M in support of Thad Cochran’s campaign in 2014. *Id.*, n. 4.
- That Butler Snow attorney Haley Barbour provided collateral to secure the Thad Cochran Super PAC’s bank loan from Trustmark Bank. *Id.*
- That Butler Snow and Clark directly and indirectly contributed and raised funds for and made extraordinary financial contributions to the Thad Cochran Campaign, Cochran’s Political Action Committees, Cochran-related Super PACS, and the Senate Victory Fund. *Id.*, ¶ 131.
- That Butler Snow and Clark acted on behalf of Senator Cochran and that they were delegated his authority, and that Clark and Butler Snow filed the Rose Cochran Incident Report in their capacity of representing Senator Cochran. *Id.*, ¶ 133-134.
- That Trustmark National Bank was the single largest contributor to a Cochran Super PAC, and that it had financed the Washington, D.C., home of Senator Cochran’s now-wife, the then Kay Webber, where Senator Cochran also lived. *Id.*, ¶¶ 170-171.

¹ Alternatively, if Thad Cochran does not have knowledge of these facts and actions being taken on his behalf, that lack of knowledge is equally important. Either way, it is important discovery.

The Amended Complaint also alleges that Thad Cochran and his campaign learned of the video produced by Clayton Kelly that showed Mrs. Rose Cochran. *Id.*, ¶ 173.

In an unveiled effort to deflect from its own culpability, Butler Snow repeatedly claims that the filing of the report and all the related actions taken by them were “on behalf of the Cochran family.” Dkt. 16, Butler Snow Memo in Support of Motion to Dismiss, p. 4; *see also* p. 7 (“The conduct reported by the Butler Snow Defendants on behalf of the Cochran family accurately described the facts about Clayton Kelly’s conduct to the Madison authorities ...”), pp. 3-4 (“Butler Snow undertook the representation of the Cochran family and, on their behalf, made inquiry with the Mayor of the City of Madison (where St. Catherine’s is located) as to the identity of the appropriate person in the police department to whom the incident should be reported. Butler Snow then, on behalf of the Cochran family, participated in a meeting with the Madison police to report the event and provided the police with access to the video that contained the picture of Mrs. Cochran. *Id.* ¶¶176, 179, 183-84, 187-89.”)

Whether Butler Snow acted “on behalf of the Cochran family” is a relevant fact. Whether Senator Cochran relied upon advice of counsel is a relevant fact. Thad Cochran’s knowledge and information about a response to and use of this video is relevant and important to the factual development of the Plaintiffs’ case. As such, Senator Cochran is a fact witness whose testimony is highly relevant and discoverable. Thad Cochran was disclosed as a person with knowledge about the facts of the case in Plaintiffs’ Initial Disclosures.

The Need to Preserve Testimony

On information and belief, Plaintiffs have a good faith concern that Senator Cochran’s health may pose a legitimate danger to the preservation of his testimony. There have been numerous media reports regarding the decline in Thad Cochran’s health.

By way of example, a December 21, 2017, article by John Bresnahan in Politico bore the headline, “Cochran’s future in the Senate in doubt” and raised serious concerns about Senator Cochran’s health. *See Exhibit 1* hereto.² The December Politico article noted that Thad Cochran, despite being chairman of the Appropriations Committee, has not presided over a hearing since early September 2017, had not given a speech on the Senate floor for the entirety of 2017, and had introduced only two bills during the year. *Id.*, p. 1. It went on to report that he only “weighs in” on issues via official statements from his office or the appropriations panel and “has stopped meeting with anyone about substantive committee business.” *Id.*, p. 1-2. It speculated that he will step down from his chairmanship and possibly resign from the Senate. *Id.*, p. 2.

Senator Cochran is eighty (80) years old. In late fall 2017, his health made national news when a Politico reporter interviewed him in October 2017 and described him as “frail and at times disoriented.” *See Exhibit 2* hereto (“Frail and disoriented, Cochran says he’s not retiring”)³. He spoke “in a low voice” and the reporter related that the Senator had to be “guided by staffers” and reminded where the Senate chamber is located. *Id.* The article reported that Thad Cochran had trouble answering questions and “seemed confused and just repeated the question.” *Id.* When asked by a reporter about a vote on budget resolution, he again was unable to answer, responding, “It’s a beautiful day outside.” *Id.* He even voted the wrong way on an amendment to a bill and had to be corrected by aides. *Id.*

An October 18, 2017, article in the Clarion Ledger reported that Senator Cochran was seen using a wheelchair. *Exhibit 3* hereto⁴. That article also reported that the Senator’s staff has been

² <https://www.politico.com/story/2017/12/21/mississippi-senate-thad-cochran-future-in-doubt-308157> (last accessed Feb. 19, 2018).

³ <https://www.politico.com/story/2017/10/18/thad-cochran-says-not-retiring-senate-243918> (last accessed Feb. 19, 2018).

⁴ <https://www.clarionledger.com/story/news/politics/2017/10/18/how-sick-sen-thad-cochran/776690001/> (last accessed Feb. 19, 2018).

tight-lipped about his absence from the Senate, giving only “brief written explanations” about his health and declining to give specifics. *Id.* There is ample basis for the Plaintiffs’ genuine and good faith concern that if forced to wait until Phase II to take Thad Cochran’s deposition, he may become unable to sit for his deposition.

Under the Case Management Order, Phase II of discovery will not begin until May 11, 2018, at the earliest. Dkt. 67, 6.F.5. The Federal Rules anticipate and recognize that occasions present themselves where testimony may be lost as time passes and there is a need to preserve testimony—sometimes even before a suit is brought. This Court, too, acknowledges as much by having allowed for depositions to be taken out of order by motion of the parties. The allegations of the Amended Complaint make clear that Senator Cochran is a material fact witness, and the attached exhibits make clear that there is a genuine need to ensure his testimony is preserved. Given the straightforward nature of this Motion, Plaintiffs respectfully request that they be relieved of the need to submit a supporting memorandum brief. Out of precaution, this Motion is also being filed as a Memorandum in Support of the Motion.

WHEREFORE, PREMISES CONSIDERED, Robin Mayfield, William Mayfield, Owen Mayfield, and the Estate of Mark Mayfield, Plaintiffs herein, respectfully request that the Court enter an Order allowing them to file a Notice of Deposition for Senator Thad Cochran, and for such other relief as the Court deems proper.

Respectfully submitted this, the 19th day of February 2018.

/s/Dorsey R. Carson, Jr.

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that the foregoing has been electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

This the 19th day of February 2018.

/s/ Dorsey R. Carson, Jr.

OF COUNSEL